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May 16, 2018

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Office of Proceedings
May 16, 2018
Part of
Public Record

BY E-FILING

The Honorable Cynthia T. Brown
Chief, Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: *Central Valley Ag Grinding, Inc. and Central Valley Ag Transport Inc. v. Modesto & Empire Traction Co.*, NOR 42159, Surreply to Verified Reply to Petition for Preliminary Injunction

Dear Ms. Brown:

Central Valley Ag Grinding, Inc. and Central Valley Ag Transport, Inc. (individually and collectively, "CVAG") respectfully seeks leave to submit this letter as a surreply to the Verified Reply to Petition for Preliminary Injunction ("Reply") that Modesto and Empire Traction Company ("MET") filed on May 14, 2018. Good cause exists for accepting this concise filing to correct MET's major misstatements and omissions of both fact and law, and to respond to its new allegations and misconduct.¹

MET's Reply contains numerous factual and legal misstatements and omissions, the most egregious of which include the following:²

1. Expanded Cessation of Unit Train Service and Illegal Embargo. Following its April 27, 2018 email directive to CVAG blocking all future interchange and delivery of canola and cotton seed unit trains, MET now declares that it has "ceased unit train delivery" altogether of all shipments of livestock feed to CVAG's Modesto Facility, including Corn Gluten and DDGS. Reply at 2. MET has now sought to remove all vestiges of the unit train service that it provided to CVAG's Modesto Facility for nine straight years. MET does so by unilateral edict, without any announcement to or discussion with CVAG, much less a tariff change or other form

¹ E.g., *Pyco Indus., Inc. – Alternative Rail Serv. – S. Plains Switching, Ltd.*, FD 34802 (STB served Jan. 26, 2006) at 1 (accepting surreply in similar situation as "instructive in our analysis"); *Michigan Air-Line Ry. Co. – Abandonment Exemption – in Oakland Cnty., Mich.*, AB 1053 (Sub-No. 1X) (STB served May 18, 2011) at 1 (accepting surreply that "addresses allegations first asserted in [] reply, and because it establishes a more complete record").

² Omission of other matters should not be treated as acquiescence.

of notice. Reply at 2-3.³ Specifically, MET states it has recently issued a “note” to the Open and Prepay Station List (“OPSL”) to permanently block CVAG’s unit train traffic⁴ and “it has requested that BNSF and UP (each of which possesses pricing authority over MET’s system under handling line agreements with MET) do the same.” Reply at 2-3. MET’s use of the rail industry (AAR) OPSL note system to close stations and restrict unit train interchange and delivery to a facility MET designed and built for that very purpose, and to enlist other carriers and the AAR to help carry out its exclusionary scheme, is clearly abusive and improper.

2. Use of OPSL and Selective Embargo Controls to Extract Improper Leverage.

Despite disingenuously depicting its cessation of unit train service as the “responsible course” to avoid “a rail service meltdown on its own tracks or those of its Class I partners” (Reply at 14), MET also announces that it “*will lift the maximum carload length restrictions and accept interchange of larger deliveries*” if CVAG only meets MET’s full prepayment demands. Reply at 3, 14. MET will use the OPSL to “control[] traffic movement” by issuing a “permit to provide a controlled movement of traffic to a specific situation.” *Id.* at 2 n.2. MET’s latest manipulations used to block and restrict service, except where the customer pays, is an abuse of the OPSL and embargo procedures⁵ and violates longstanding agency precedent.⁶ MET’s actions are particularly pernicious here because CVAG is a mere receiver with no responsibility over the shipment of commodities and little or no ability to request and obtain a special permit.

3. Mischaracterization of CVAG’s Service Needs and Security Position.

MET falsely asserts that “MET must provide intra-terminal switching services” for CVAG and that CVAG is “insisting that MET should, at most, accept a reduced flat fee rate that CVAG is willing to supply.” Reply at 2, 5. CVAG is not asking CVAG to perform dozens of individual, private car switches after carload deliveries. CVAG instead receives large blocks of cars in unit train service on tracks that MET designed and built for that purpose. CVAG need only provide, at most, one train cut for unit train delivery and removal. However, MET purposely insists on recasting those single switches as many dozens of moves of individual cars and charging for each individual railcar and related events. MET thus miscasts the limited delivery service that it

³ MET also retains its April 27th directive that it will block interchange and delivery of shorter trains unless “MET has been able to confirm that [the CVAG delivery] Tracks . . . are free to accept” a shipment. Pet. at 25-26, 30. MET contends its restrictions do not in any way violate the law, but instead are “in keeping with industry practice.” Reply at 14.

⁴ CVAG’s Petition referenced Modesto and nearby MET terminal delivery stations as being UP and BNSF served and open stations under the OPSL. Pet. at 11 n.14. MET apparently now seeks to close that “loophole” by unilaterally closing an open station to unit train service.

⁵ AAR Circular TD-1 prohibits use of temporary embargoes “[a]s a permanent measure to control traffic,” for a “failure to pay freight charges and/or demurrage,” to “[d]e-market traffic,” or to “[r]estrict business growth.” AAR Circular TD-1, Art. II.A.

⁶ Railroads are common carriers and cannot pick and choose the traffic they wish to transport, interchange, or deliver. *E.g.*, *Classification Ratings of Chems.*, *Conrail*, 3 I.C.C. 2d 331, 335-37 (1986); *Eric Strohmeier & James Riffin – Acq. & Op. Application – Valstir Indus. Track in Middlesex & Union Cntys.*, N.J. FD 35527 (STB served Oct. 18, 2011).

provides in order to rely on inappropriate benchmarks. Despite MET's claims, the dispute is not one "over the level of switching charges," and CVAG is not seeking a "free or reduced switching" fee for special private switching of individual cars. *Id.* at 4, 21. Nor does CVAG "euphemistically [seek] . . . a 'security deposit'" through "a reduced payment arrangement." *Id.* at 3. It is *MET* that is making oblique prepay security demands through a new, targeted, and vastly overbroad "Special Unit Train Charges *Security Deposit*" program. Complaint at ¶¶ 13, 15, 49-50. CVAG simply seeks reasonable and narrow relief from MET's new prepay demands for unfounded charges during the pendency of the proceeding. Those prepay demands threaten CVAG's business in blatant violation of *Railroad Salvage*,⁷ *G&T*,⁸ and related precedent that reasonably caps deposits on a *per company*, not per train, basis, without drawdowns for charges during the pendency of the dispute. To be clear, CVAG accepts that it will face back charges should the charges later be upheld (discussed further below).

4. CVAG Faces Irreparable Harm, and MET Does Not. MET faults CVAG for failing to "show[] *how* it could not afford to absorb the charges based on CVAG's current profit margins." Reply at 15-18. The assertion is nonsense. CVAG showed that MET's prepay demands amount to total CVAG costs of \$7.00 - \$8.50 per ton, but CVAG's transload revenues (obtained in a competitive market) are approximately only \$5.00 per ton, such that the increased charges "make the Facility completely unfeasible." Pet. at 28-29, V.S. Konzen at ¶¶ 94-103. MET also ignores Gavilon's statement that "[t]he prepayment rates being sought by MET . . . meet or exceed the transload fees Gavilon pays to CVAG." *Id.*, Counsel's Exh. 7 at 2.⁹

MET's claim that it is only "virtually breaking even on CVAG traffic" (Reply at 26) is of no consequence. Even if substantiated, any harm would be attributable to MET's arrangements with BNSF and UP, which appear at least adequate.¹⁰ Retrospective remorse over those arrangements does not justify its treatment of CVAG. In any event, MET's legal rights to seek to collect any additional lawful charges will be fully preserved by the requested injunction. CVAG seeks an injunction, not a prescription. The injunction will not "preclude MET from obtaining after-the-fact relief if its charges are upheld as reasonable." Reply at 11, 24-26. There will be no Board-prescribed rate protection, as in *Ariz. Pub. Serv. Co. and PacifiCorp. v. Burlington N. & S.F. Ry. Co.*, NOR 42077 (STB served May 12, 2003); Reply at 15. The interim relief sought would preserve all of MET's existing legal rights, including the right to bring a civil action to recover any valid charges for transportation or service. 49 U.S.C. § 11705(a).

⁷ *R.R. Salvage & Restoration, Inc. – Pet. for Investigation & for Emergency Relief Under 49 U.S.C. 721(b)(4) – Sec. Deposit for Demurrage Charges, Mo. & N. Ark. R.R.*, NOR 42107 (STB served June 30, 2008).

⁸ *Rail General Exemption Auth. – Miscellaneous Agric. Commodities – Pet. of G&T Terminal Packaging Co., Inc., et al., to Revoke Conrail Exemption*, EP 346 (Sub-No. 14A) (ICC served June 13, 1989).

⁹ MET also attempts to minimize its earlier acknowledgement that CVAG "cannot afford the cost" (Pet. at 38, Counsel's Exh. 8) as merely "pre-litigation discussions." Reply at 16 n.31.

¹⁰ MET does not dispute that it receives over \$20,000 per unit train as a handling carrier (Pet. at 11-12), but adds that its new management wants more. Reply at 6, 8, 23.

5. CVAG Is Likely to Succeed on the Merits. MET claims that its switching charges to CVAG amounting to \$100 per minute or over \$5,000 per hour will likely be upheld because “the law and agency policy” eschew cost-based pricing, and instead allow “market-based rate-setting.” Reply at 12-13. However, carrier costs clearly are a factor in the reasonableness of MET’s charges and practices, and MET’s effort to convert hourly charges into per car ones deviates from industry norms for unit train service. In any event, common carriers cannot deploy switching charges and prepay demands as means to refuse to provide service or interchange traffic with other carriers. MET’s unprecedented, targeted, and punitive charges and prepay demands admittedly have no cost justification and are clearly designed for improper purposes.

6. Public Interest Considerations. MET claimed just last week that the public interest favored denial of service relief because the “extremely competitive” market in the Central Valley for transloading meant that a multitude of alternative facilities that could easily replace CVAG. Faced with the unsoundness of its claim (*see* CVAG Application Rebuttal at 6-8), MET now asserts the opposite, *i.e.*, that CVAG can somehow easily “pass[] the accessorial charges along to the purchasers of its transload services.” MET Reply at 16-21. MET claims CVAG’s customers – “large shippers like Archer Daniels Midland Company, JD Heiskell, A.L. Gilbert Company, and Gavilon” – will freely “adjust their feed prices at Modesto to reflect the costs of MET’s switching.” *Id.* MET’s speculation lacks foundation and departs from the market reality of the California dairy industry, where rising costs of production, combined with unfavorable market conditions, has caused significant dairy farm shutdowns in recent years. Pet. at 28-31. MET’s analysis is also at odds with the major feed suppliers participating in the market. Petition at 31, Gavilon letter, Counsel’s Exh. 7 at 2 (MET’s “actions are creating considerable business harm and uncertainty to Gavilon and the local dairy industry”); Application Rebuttal, A.L. Gilbert Company letter, Exh. 1 at 2 (“MET’s current actions . . . are causing us and our customers significant problems in terms of additional costs and a great deal of uncertainty” and “significant market volatility and business harm.”). CVAG simply does not have the associated market power than MET surmises.

MET has wholly failed to support its factual and legal claims, and has not presented any viable arguments to overcome CVAG’s showings of likelihood of success, irreparable harm, lack of harm to MET, and the public interest. Accordingly, the Board should grant CVAG’s request and issue the preliminary injunction and related relief.

Respectfully submitted,



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cc: Service List

CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of May, 2018, caused a copy of the foregoing to be served by overnight mail and email upon outside counsel for MET, as follows:

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